(5)

Supreme Court, U.S.
FILED
APR 9 2003
OFFICE OF THE CLERK

No. 02-856

In the Supreme Court of the United States

FEDERAL AVIATION ADMINISTRATION, PETITIONER

v.

CITY OF ALAMEDA, CITIZENS LEAGUE FOR AIRPORT SAFETY AND SERENITY, BERKELEY KEEP JETS OVER THE BAY, PORT OF OAKLAND, AND COMMISSIONERS, PORT OF OAKLAND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

6 PP

In the Supreme Court of the United States

No. 02-856

FEDERAL AVIATION ADMINISTRATION, PETITIONER

v.

CITY OF ALAMEDA, CITIZENS LEAGUE FOR AIRPORT SAFETY AND SERENITY, BERKELEY KEEP JETS OVER THE BAY, PORT OF OAKLAND, AND COMMISSIONERS, PORT OF OAKLAND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

1. Respondents do not dispute that the Ninth Circuit's construction of 49 U.S.C. 46110(a) in this case is erroneous, conflicts with decisions of other circuits, and involves a question of continuing importance.

Section 46110(a) provides that "a person disclosing a substantial interest in an order issued by * * * the Administrator of the Federal Aviation Administration * * * under this part," *i.e.*, Part A of Subtitle VII of Title 49, "may apply for review of the order by filing a petition for review in the United States Court of Ap-

peals." The Ninth Circuit held that Section 46110(a) does not vest the courts of appeals with jurisdiction to review an order issued by the Federal Aviation Administration (FAA) pursuant to its authority under both Part A of Subtitle VII of Title 49 and other Parts of Subtitle VII, when the petitioner's challenge to the order is based on determinations under statutory provisions outside Part A. As previously explained, the Ninth Circuit's holding departs from the most sensible construction of Section 46110(a), conflicts with holdings of the Second and Tenth Circuits, and threatens to complicate and prolong the review of time-sensitive orders approving airport development projects. See Pet. 6-13.

Respondents Port of Oakland et al. agree (Br. 5) that the Ninth Circuit's decision in this case "misinterprets 49 U.S.C. § 46110(a), conflicts with decisions of other circuit courts, and undermines Congressional intent." Those respondents also agree (Br. 6) that the Ninth Circuit's decision involves an issue "important for the nation's airports," because its construction of Section 46110(a) "will unnecessarily complicate judicial review of FAA orders approving airport projects and delay vitally needed airport improvements." Respondents City of Alameda et al., while declining to take a position in this Court on the FAA's petition for certiorari and motion to vacate in light of the parties' settlement and the dismissal of the case, note (Br. 2) that they filed their petition for review below based on their understanding that the courts of appeals have "exclusive jurisdiction * * * pursuant to 49 U.S.C. 46110(a)" of petitions challenging FAA orders such as the one in this case.

Accordingly, respondents offer no reason to conclude that the Ninth Circuit's decision would not warrant

review on certiorari if the case had not become moot by settlement. Indeed, respondents Port of Oakland et al. specifically concur (Br. 5-6) in the FAA's arguments as to why review by this Court would be warranted.

2. Both sets of respondents also confirm that the FAA played no role in their settlement of the case. See Port of Oakland et al. Br. 4 ("The FAA was not involved in the settlement negotiations, and it was not a party to the settlement agreement requiring dismissal of the federal proceedings."); City of Alameda et al. Br. 1 ("The FAA is not a party to the settlement agreement and was not involved in the settlement negotiations."). There is thus no question that the FAA has been prevented from obtaining review and reversal of the Ninth Circuit's statutory jurisdictional ruling for reasons not of its own making. The FAA therefore is equitably entitled to vacatur. See *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 25 (1994).

3. Respondents City of Alameda et al. err in suggesting (Br. 2) that the Second Circuit's recent decision in *Committee to Stop Airport Expansion* v. *FAA*, 320 F.3d 285 (2003), "adheres to the jurisdictional ruling and rationale of the Ninth Circuit in this case." See Port of Oakland et al. Br. 5-6. In fact, the Second Circuit in that case "affirmed the basic reasoning of" its own earlier decision in *Sutton* v. *United States Department of Transportation*, 38 F.3d 621 (1994) (see Pet. 9-10), and made clear that so long as "an FAA action is taken in substantial part pursuant to Part A, jurisdiction will lie exclusively with the circuit courts." *Committee to Stop Airport Expansion*, 320 F.3d at 290. Thus, the court explained, if a challenged FAA order involves "the exercise of authority deriving from both Parts A and B," the courts of appeals "would have jurisdiction to review such an order" under Section 46110(a).

Ibid. The Second Circuit also explained that whether review is available under Section 46110(a) depends on "the nature of the FAA action challenged," not on "how petitioners plead[ed] their case." *Id.* at 291; cf. Pet. App. 4a (Ninth Circuit's holding in this case that review was unavailable because of the nature of the challenge to the FAA action). The Second Circuit held that Section 46110(a) was inapplicable to the order challenged in that case *only* because the court viewed that particular order as not involving any exercise of the FAA's authority under Part A. See 320 F.3d at 288-289.[1]

Accordingly, the Second Circuit's decision in *Committee to Stop Airport Expansion* does not embrace the Ninth Circuit's construction of Section 46110(a). Nor does the Second Circuit's decision suggest that the courts of appeals would not have exclusive jurisdiction under Section 46110(a) to review all challenges to FAA orders that, like the order in this case (see Pet. 3-4), are expressly issued under Part A as well as other Parts of Subtitle VII of Title 49. *Committee to Stop Airport Expansion* thus does not alter the dimensions of the circuit conflict identified in the certiorari petition. Nor does that decision affect the need for this Court to vacate the Ninth Circuit's decision in this case and

---

[1] The Second Circuit cited the Ninth Circuit's decisions in this case and in *City of Los Angeles* v. *FAA*, 239 F.3d 1033, 1035 (2001), for the proposition that "Section 46110 does not grant jurisdiction to review orders issued under Part B" of Subtitle VII of Title 49. *Committee to Stop Airport Expansion*, 320 F.3d at 287. As the Ninth Circuit itself recognized, however, the FAA's order in this case was issued "pursuant to both sections [*i.e.*, Parts] A and B of Title 49 Subtitle VII." Pet. App. 4a.

thereby eliminate that precedential ruling in the Ninth Circuit and the circuit conflict that it created.[2]

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari and the motion to vacate, the petition for a writ of certiorari should be granted and the judgment of the court of appeals should be vacated as moot.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

APRIL 2003

---

[2] The government has sought an extension of time until April 30, 2003, in which to file a petition for rehearing or rehearing en banc in *Committee to Stop Airport Expansion*. The Solicitor General has not yet decided whether to file such a petition.